COURT OF APPEALS
DECISION
DATED AND FILED

February 13, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP2358-CR **Cir. Ct. No. 2005CT831**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RUSSELL A. NORDQUIST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Outagamie County: DENNIS C. LUEBKE, Judge. *Affirmed*.

¶1 PETERSON, J.[1] Russell Nordquist appeals a judgment convicting him of operating a motor vehicle while under the influence, second offense and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

operating after revocation, third offense. Nordquist argues the circuit court erred when it denied his motion to suppress because the arresting officer did not have reasonable suspicion to make a traffic stop. We disagree and affirm the judgment.

BACKGROUND

¶2 On May 22, 2005 at approximately 2:40 a.m., officer Jeff Miller of the Appleton Police Department observed a black vehicle parked illegally. Miller observed a man exit the car. Miller stated the man appeared intoxicated, and stumbled and tripped over the curb. Miller advised the man that he should not drive his vehicle and told the man to call someone to pick up the car or to leave it parked overnight and go home. The man advised Miller that his wife was coming from Green Bay to pick him up.

¶3 Miller returned to his foot patrol duties. Miller stated he observed the man walk back toward his car, but when the man noticed Miller observing him, "he would wander back up the street, and then I couldn't see him for a few more minutes and then [he would] come back."

¶4 At approximately 3 a.m., Miller returned to his squad car. Miller then observed the black car pull out of its parking space. Miller testified he believed the same man he spoke with earlier had returned to his vehicle. Miller stated he was "100 percent sure" it was the same vehicle he observed at 2:40 a.m. Miller then executed a traffic stop. After conducting the stop, Miller approached the driver and determined he was not the same person Miller had originally spoken with. The driver identified himself as Nordquist. Nordquist was subsequently arrested for operating while under the influence.

¶5 Nordquist filed a motion challenging the traffic stop which led to his arrest. At the motion hearing, Miller testified he stopped the car because he believed the same man he initially observed exit the vehicle had returned to the vehicle. Miller stated he believed this because of the man's behavior in walking back toward his car and then away from the car when the man observed Miller or another officer. Miller further stated that his past experience revealed approximately one-half of drivers ignored orders to not drive home. Miller also stated the twenty minutes between when he initially spoke with the man, and when he observed the car start, was inconsistent with the man's claim that his wife was driving from Green Bay to Appleton, because that drive would take longer than twenty minutes.

¶6 The court denied Nordquist's motion. Nordquist subsequently entered a no contest plea to operating while intoxicated, second offense.

DISCUSSION

¶7 When reviewing a circuit court's denial of a motion to suppress, we uphold the circuit court's findings of fact unless they are clearly erroneous. *See* ***State v. Waldner***, 206 Wis. 2d 51, 54, 556 N.W.2d 681 (1996). However, whether those facts satisfy the constitutional requirement of reasonableness is a question of law we review without deference. ***Id.***

¶8 The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. Detention of a suspect must be based upon a

reasonable suspicion of criminal activity.[2] ***Waldner***, 206 Wis. 2d at 55-56. Reasonable suspicion is dependent on whether an officer's suspicion is grounded in "specific articulable facts and reasonable inferences from those facts" indicating the individual committed a crime. ***Id.*** at 56 (quoting ***State v. Guzy***, 139 Wis. 2d 663, 675, 407 N.W.2d 548 (1987)). What constitutes reasonable suspicion is a common sense test. ***Id.*** We look to what a reasonable police officer would "reasonably suspect in light of his or her training and experience." ***Id.*** When considering whether reasonable suspicion exists, an officer is not required to rule out the possibility of innocent behavior. ***State v. Anderson***, 155 Wis. 2d 77, 84, 454 N.W.2d 763 (1990).

¶9 Nordquist contends that when Miller stopped the black car, he had "no clear evidence" that the man who drove the car was the man he had earlier told not to re-enter the vehicle. However, Miller did not need clear evidence; rather he needed a reasonable suspicion to justify the stop. ***Waldner***, 206 Wis. 2d at 55-56. Miller testified that, for a number of reasons, he believed the man operating the car was the same man with whom he initially spoke. First, that person exhibited suspicious behavior in walking back toward his vehicle after Miller told him not to drive it. Second, in Miller's past experience, approximately one-half of drivers ignored orders to not drive.[3] Finally, Miller stated the twenty

[2] Wisconsin courts have clarified that an officer has legal authority to stop under the reasonable suspicion standard for activity consistent with "either a civil forfeiture or a crime." ***State v. Krier***, 165 Wis. 2d 673, 478 N.W.2d 63 (Ct. App. 1991).

[3] Nordquist argues "the officer's justification for stopping the car does not meet the threshold for probable cause" because Miller's testimony regarding his history with individuals he asked not to re-enter their cars "hardly makes it more likely than not that the man had returned to the black car on that evening." This is an incorrect standard. As stated in ***State v. Waldner***, 206 Wis. 2d 51, 59, 556 N.W.2d 681 (1996): "The Fourth Amendment does not require a police officer who lacks the precise level of information necessary for probable cause to arrest to simply (continued)

minutes between when he initially spoke with the man and when he observed the car start was inconsistent with the man's claim that his wife was driving from Green Bay to Appleton, because that drive would take longer than twenty minutes. In light of these specific facts and Miller's training and experience, Miller's belief that the man he initially spoke with had re-entered the vehicle was reasonable. *See* ***id.*** at 56.

¶10 Nordquist also contends the amount of time between the initial confrontation and the stop allowed ample time for the initial driver's wife to travel from Green Bay to Appleton to pick him up and therefore she could have been driving. However, the trial court believed Miller's testimony that a short amount of time passed between the initial confrontation and the stop and this led him to believe the man returned to his car. The trial court, not the appellate court, is the ultimate arbiter of weight and credibility. WIS. STAT. § 805.17(2) (2003-04) Its credibility assessments will not be overturned on appeal unless they are inherently or patently incredible. ***Chapman v. State***, 69 Wis. 2d 581, 583, 230 N.W.2d 824 (1975).

¶11 In addition, Nordquist argues that a number of people were with the initial driver when he got out of the car and any one of them could have been driving. While the possibility of someone else driving the car did exist, Miller was not required to rule out the possibility of innocent behavior before stopping the car. *See* ***Anderson***, 155 Wis. 2d at 84.

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shrug his or her shoulders…. The law of investigative stops allow police officers to stop a person when they have less than probable cause."

¶12 Finally, Nordquist argues Miller should have ended the stop as soon as he realized the person he pulled over was not the original driver of the vehicle. The record shows Miller's realization that the person he stopped was not the original driver occurred simultaneously with Miller smelling alcohol on Nordquist. Nordquist cites no case requiring a police officer to walk away from suspected illegal behavior. Under these circumstances, it would have been poor police work indeed for Miller to have failed to investigate this behavior further. *See* ***Terry v. Ohio***, 392 U.S. 1, 23 (1968).

By the Court. – Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE § 809.23(1)(b)4 (2003-04).